Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–136–1995
GOPAL SRI RAM, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
23 APRIL 1997

Contract *— Assignment — Absolute assignment — Whether absolute deed of assignment satisfied loan in full upon its execution — Whether debt was extinguished by absolute assignment*

Contract *— Guarantee — Guarantor's liability — Loan to principal debtor secured by absolute deed of assignment and guarantee — Deed of assignment executed — Whether execution of absolute deed of assignment extinguished debt — Whether guarantee not extant and consequently not available for enforcement*

Civil Procedure *— Estoppel — Judgment in previous suit — Whether party to new action estopped by judgment — Requirement of mutuality between parties or interest*

The respondent was a licensed bank. It lent RM1m to a company called Hipparion (M) Sdn Bhd ('Hipparion'). The loan was secured by two separate instruments: (i) a deed of assignment under which Hipparion absolutely assigned its right, title and interest in a floor of a building ('the subject property') to the respondent; and (ii) a guarantee executed by the appellant who was a director of Hipparion. Hipparion failed to meet its obligations under the loan agreement. The respondent took steps to recover its money by enforcing the assignment and seeking an order for vacant possession and liberty to sell the subject property. The High Court granted the relief claimed. Hipparion then appealed to the Supreme Court which affirmed the orders made by the court below and dismissed the appeal (see [1988] 2 MLJ 62; [1989] 2 MLJ 149). The Supreme Court held that the deed of assignment of the subject property was absolute in nature and not by way of charge only as argued by Hipparion. The proceeds from the sale of the subject property were insufficient to meet Hipparion's liability to the respondent in full. The respondent therefore sued the appellant upon his guarantee. That was the suit which formed the subject matter of the present appeal.

The appellant argued that the respondent took an assignment of the subject property as consideration for the loan. It was further argued that since the Supreme Court had in the earlier proceedings between the respondent and Hipparion held that the assignment of the subject property was absolute and not by way of charge only, the respondent should be estopped from arguing that the deed was by way of security only. It was contended that, applying the law governing consideration for contracts, the debt was extinguished by the assignment. The guarantee was therefore not extant and consequently not available for enforcement.

Held, dismissing the appeal:

(1) The argument that the deed of assignment was absolute and therefore satisfied the loan in full upon its execution overlooked the fact that the point under discussion, namely whether the deed was absolute or by way of charge only, arose in the earlier proceedings between the respondent and Hipparion in a procedural context. It was never Hipparion's case in the earlier proceedings that its debt had been extinguished upon the execution of the deed in question. Therefore, as a matter of principle, the finding by the courts at all levels in the Hipparion proceedings that the deed of assignment was absolute and not by way of charge only was made in the context of the procedure adopted by the instant respondent to effect a sale of the subject property. The decision of the Supreme Court in the Hipparion proceedings did not facilitate the argument that the debt owed by Hipparion had been extinguished by the absolute assignment it gave the respondent.

Further, as a matter of policy, countenancing the appellant's argument would have the effect of frustrating the recovery of loans in all cases where a financial institution takes an absolute assignment because there is unavailable a title capable of being subject to a registered charge. The construction and sale of multi-storeyed residential and commercial premises would grind to a halt because no financier will ever lend money if the law were to declare all sums due under a loan agreement irrecoverable because a deed of assignment absolute of particular premises has the effect of extinguishing the debt. The court was unable to countenance a proposition that would produce so radical an effect (see pp 595I and 596A–E).

(2) The second reason for rejecting the appellant's argument was to be found in the doctrine of estoppel. An estoppel, whether procedural or substantive, must be mutual. The appellant was not a party to the Hipparion proceedings. Neither was he, as a director of Hipparion, its representative in interest. Therefore, he was a stranger to the Hipparion proceedings. The determination of the issues in those proceedings did not in any way affect his rights. The proceedings taken against him to enforce the guarantee were separate and distinct from the Hipparion proceedings. Accordingly, there was no mutuality between the parties or interest. Absent mutuality, the appellant's argument could not stand. Hence, there was no injustice done to him if the respondent went behind the four corners of the deed of assignment to show the true purpose for its creation (see pp 596F, I and 597A–B, F); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 followed.

Obiter:

It is trite that a creditor is entitled to pursue all the remedies available to him in law and in equity for the purpose of recovering moneys due to him from the debtor and his surety (see p 597G); *China & South Sea Bank Ltd v Tan* [1989] 3 All ER 839 followed.

[Bahasa Malaysia summary

Penentang merupakan sebuah bank berlesen. Ia telah memberi pinjaman sebanyak RM1 juta kepada sebuah syarikat bernama Hipparion (M) Sdn Bhd ('Hipparion'). Pinjaman itu dijamin oleh dua instrumen berasingan: (i) suratikatan penyerahhakan di mana Hipparion menyerahhak hak, hakmilik dan kepentingan dalam satu tingkat sebuah bangunan ('harta subjek') secara muktamad kepada penentang; dan (ii) satu gerenti yang dilaksanakan oleh perayu yang merupakan seorang pengarah Hipparion. Hipparion gagal memenuhi kewajipannya di bawah perjanjian pinjaman. Penentang mengambil langkah untuk mendapat kembali wangnya dengan menguatkuasakan penyerahhakan dan meminta satu perintah untuk milikan kosong dan kebebasan untuk menjual harta subjek. Mahkamah Tinggi memberikan relief yang dituntut. Hipparion kemudiannya merayu kepada Mahkamah Agung yang mengesahkan perintah yang dibuat oleh mahkamah bawah dan menolak rayuan (lihat [1988] 2 MLJ 62; [1989] 2 MLJ 149). Mahkamah Agung memutuskan bahawa suratikatan penyerahhakan harta subjek adalah berciri muktamad dan bukan sekadar gadaian sahaja sebagaimana yang dihujahkan oleh Hipparion. Hasil daripada jualan harta subkjek tidak mencukupi bagi memenuhi liabiliti Hipparion terhadap penentang sepenuhnya. Oleh itu penentang mendakwa perayu atas gerentinya. Guaman itulah yang membentuk perkara subjek rayuan ini.

Perayu berhujah bahawa penentang telah mengambil penyerahhakan harta subjek sebagai balasan untuk pinjaman. Ia seterusnya dihujahkan bahawa oleh kerana dalam prosiding yang lebih awal di antara penentang dan Hipparion Mahkamah Agung telah memutuskan bahawa penyerahhakan harta subjek adalah muktamad dan bukan melalui gadaian sahaja, penentang harus diestop daripada menghujahkan bahawa suratikatan itu adalah melalui cagaran sahaja. Ia dihujahkan bahawa, dengan memakai undang-undang yang menguasai balasan untuk kontrak, hutang telah dilunaskan oleh penyerahhakan. Oleh yang demikian, gerenti itu tidak lagi wujud dan dengan itu tidak boleh dikuatkuasakan.

Diputuskan, menolak rayuan:

(1) Hujah bahawa suratikatan penyerahhakan adalah muktamad dan oleh itu memenuhi pinjaman sepenuhnya atas pelaksanaan tidak mengendahkan fakta bahawa perkara yang dibincang, iaitu sama ada suratikatan adalah muktamad atau dengan cara gadaian sahaja, timbul dalam prosiding yang lebih awal di antara penentang dan Hipparion dalam konteks prosedur. Ia tidak pernah merupakan kes Hipparion dalam prosiding yang lebih awal bahawa hutangnya telah dilunaskan atas pelaksanaan suratikatan yang berkenaan. Oleh yang demikian, sebagai satu perkara prinsip, pendapat mahkamah di semua tahap dalam prosiding Hipparion bahawa suratikatan penyerahhakan adalah muktamad dan tidak melalui gadaian sahaja telah dibuat dalam konteks prosedur yang diterima-pakai oleh penentang ini bagi memberi kesan kepada jualan

harta subjek. Keputusan Mahkamah Agung dalam prosiding Hipparion tidak membantu hujah bahawa hutang Hipparion telah dilunaskan oleh penyerahhakan yang diberikannya kepada penentang.

Seterusnya, sebagai perkara polisi, persetujuan dengan hujah perayu akan memberi kesan mengecewakan percubaan untuk mendapat kembali pinjaman dalam semua kes di mana sebuah institusi kewangan mengambil penyerahhakan muktamad kerana tiada hakmilik yang boleh diletakkan di bawah suatu gadaian berdaftar. Pembinaan dan jualan premis perdagangan dan perumahan bertingkat-tingkat akan terhenti kerana tiada ahli kewangan akan memberi pinjaman wang jika undang-undang mengisytiharkan semua jumlah yang terhutang di bawah suatu perjanjian pinjaman tidak boleh didapat kembali kerana suatu penyerahhakan muktamad atas premis tertentu mempunyai kesan melunaskan hutang. Mahkamah tidak dapat bersetuju dengan suatu cadangan yang akan mengakibatkan kesan yang sebegitu radikal (lihat ms 595I dan 596A–E).

(2) Alasan kedua untuk menolak hujah perayu boleh didapati dalam doktrin estopel. Suatu estopel, sama ada prosedur atau substantif, mestilah bersifat 'mutual'. Perayu tidak merupakan suatu pihak kepada prosiding Hipparion. Sebagai seorang pengarah Hipparion, dia juga bukan wakil dalam kepentingannya. Oleh itu, dia adalah orang yang asing kepada prosiding Hipparion. Penentuan isu-isu dalam prosiding itu tidak menjejaskan haknya dalam apa-apa cara. Prosiding yang diambil terhadapnya bagi menguatkuasakan gerenti adalah berasingan dan berbeza daripada prosiding Hipparion. Lantaran itu, tiada kesalingan di antara pihak-pihak atau kepentingan. Tanpa kesalingan, hujah perayu tidak boleh kekal. Justeru itu, tiada ketidakadilan kepada perayu jika penentang menggunakan setiap sudut suratikatan hakmilik untuk menunjukkan tujuan sebenar ia diwujudkan (lihat ms 596F, I dan 597A–B, F); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 diikut.

Obiter:

Adalah mantap bahawa seseorang si piutang berhak menuntut semua remedi di bawah undang-undang dan dalam ekuiti untuk tujuan mendapat kembali wang yang terhutang kepadanya daripada penghutang dan penjaminnya (lihat ms 597G); *China & South Sea Bank Ltd v Tan* [1989] 3 All ER 839 diikut.]

Notes

For cases on assignment, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1153–1174.

For cases on guarantee, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1628–1731.

For cases on estoppel, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1208–1245.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
China & South Sea Bank Ltd v Tan [1989] 3 All ER 839 (folld)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Waring, Re [1948] Ch 221 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Rules of the High Court 1980 O 31, O 83

Appeal from: Suit No 22(23)–248–88 (High Court, Pulau Pinang)

KS Narayanan (*Saranjit Singh* and *S Murthi* with him) (*Jayaraman Ong & Co*) for the appellant.
Tommy Thomas (*V Arivanandhan* with him) (*Cheong Wai Meng & Van Buerle*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal arises from a decision of the High Court at Penang whereby judgment was entered against the appellant in the sum of RM1,638,520.04 together with interest and costs. Because the learned judge has, in his judgment, dealt admirably with the relevant facts and chronology, we are spared their regurgitation. Suffice that we restate, in a summary form, only those facts that are salient to the arguments raised before us in this appeal.

The respondent is a licensed bank. In August 1983, it lent RM1m to a company called Hipparion (M) Sdn Bhd ('Hipparion'). The terms upon which the loan was to be repaid were set out in an agreement ('the loan agreement') entered into between the respondent and Hipparion. The loan was secured by two separate instruments. The first of these was a deed of assignment under which Hipparion absolutely assigned its right, title and interest in a floor of a building ('the subject property') to the respondent; the second, a guarantee executed by the appellant who is a director of Hipparion.

Hipparion failed to meet its obligations under the loan agreement. So, the respondent took steps to recover its money. It enforced the assignment by seeking a declaration of the sums due to it under the loan agreement as well as an order for vacant possession of the subject property and liberty to sell the subject property either by public auction or by private treaty. The High Court granted the relief claimed. Hipparion then appealed to the Supreme Court which affirmed the orders made by the court below and dismissed the appeal. The judgments of the High Court and the Supreme Court are reported (see [1988] 2 MLJ 62; [1989] 2 MLJ 149).

One of the arguments raised by Hipparion in support of its appeal was that for the purposes of s 4(3) of the Civil Law Act 1956, the deed of assignment was not absolute, but by way of charge only. That submission was rejected by a strongly constituted Bench of the Supreme Court which held that the deed of assignment of the subject property was absolute in nature.

A The proceeds from the sale of the subject property were insufficient to meet Hipparion's liability to the respondent in full. The respondent therefore sued the appellant upon his guarantee. That is the suit which forms the subject matter of the present appeal. In the High Court, the appellant raised a number of defences all of which failed before the judge who entered judgment for the respondent. We would, for completeness, B mention that the appellant elected not to give evidence at the trial.

Of the arguments addressed to us, we find that only one merits consideration. It has to do with the effect of the deed of assignment. The argument runs thus.

C On a proper construction of the loan agreement and the other contemporary documents, it is clear that the respondent took an assignment of the subject property as consideration for the loan. It was not a mere security because the Supreme Court had in the earlier proceedings between the respondent and Hipparion held the deed to be absolute. That finding was based upon a sustained submission by the respondent that the D assignment of the subject property was absolute and not by way of charge only. The respondent cannot now argue that the deed was by way of security only. It would be unjust to permit such an argument to prevail. Applying the law governing consideration for contracts, the debt was extinguished by the assignment. The guarantee was therefore not extant and consequently not available for enforcement.

E We must say at once that when we first heard it, we found this argument had the qualities of both attractiveness and ingenuity. However, having heard the carefully formulated response from En Thomas of counsel for the respondent, we came to the conclusion that the appellant's submission was, on closer examination, devoid of merit. Our reasons for F rejecting the appellant's argument are as follows.

It must be borne in mind that the subject property had no separate strata title. The appellant wished to borrow in order to purchase the subject property and the respondent was desirous of making the loan. The machinery of a registered charge under the National Land Code 1965 and G the remedies provided therein to a chargee against a defaulting chargor were accordingly unavailable. Yet, it was essential for the respondent to be in a position to have recourse against the subject property in the event that Hipparion defaulted in making repayment of the loan. That is why the device of a deed of assignment was resorted to by the parties. Since the assignment was absolute by the terms of the relevant deed, no question of H an equitable charge arose.

When Hipparion failed to meet its obligations under the loan agreement, the respondent had to take such steps as were necessary to recover the principal and interest. The procedure prescribed by O 83 of the Rules of the High Court 1980 ('the RHC') did not apply to the fact I pattern because there was neither a registered nor an equitable charge. The appropriate procedure was that made available by O 31 of the RHC. And that is the procedure that was resorted to by the respondent and sanctioned by the Supreme Court.

The argument that the deed of assignment was absolute and therefore satisfied the loan in full upon its execution overlooks the fact that the point

under discussion, namely whether the deed was absolute or by way of charge only, arose in the earlier proceedings between the respondent and Hipparion in a procedural context. It was never Hipparion's case in the earlier proceedings that its debt had been extinguished upon the execution of the deed in question. A careful reading of the judgment of Edgar Joseph Jr J (as he then was) at first instance and that of Gunn Chit Tuan SCJ (later CJ (Malaya)) delivered on behalf of the Supreme Court make these matters plain. It therefore follows as a matter of principle that the finding by the courts at all levels in the Hipparion proceedings that the deed of assignment was absolute and not by way of charge only was made in the context of the procedure adopted by the instant respondent to effect a sale of the subject property.

With respect, we do not see the decision of the Supreme Court in the Hipparion proceedings as facilitating the argument that the debt owed by Hipparion had been extinguished by the absolute assignment it gave the respondent. Both principle and policy lie against the opposite conclusion. The principle we have already adverted to. As far as policy is concerned, countenancing the appellant's argument would have the effect of frustrating the recovery of loans in all cases where a financial institution takes an absolute assignment because there is unavailable a title capable of being subject to a registered charge. The construction and sale of multi-storeyed residential and commercial premises would grind to a halt because no financier will ever lend money if the law were to declare all sums due under a loan agreement irrecoverable because a deed of assignment absolute of particular premises has the effect of extinguishing the debt. We are unable to countenance a proposition that would produce so radical an effect.

The second reason for rejecting the appellant's argument is to be found in the doctrine of estoppel. What in effect the appellant says is this. In the Hipparion proceedings, the respondent claimed that the deed created an absolute assignment. Now, in the action against the appellant guarantor, it is claiming that the purpose of the deed was only to seek recovery of the loan in the event of a default. In other words, it is a security document and not a deed of absolute assignment. It is unjust to permit the respondent to succeed by blowing both hot and cold. The respondent should therefore be estopped from deviating from the stand it took in the Hipparion proceedings.

Now, of the doctrines invented by the Court of Chancery, estoppel is surely the most flexible. It is a rule by which a court does justice between parties to a litigation according to the facts and substantial merits of the case. The only question at issue where estoppel is relied upon is whether it is just that the party sought to be estopped ought to succeed upon a particular issue or in the action generally, as the case may be (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

However, despite its flexibility, the doctrine has, woven into its basic fabric, certain requirements that constitute its hallmarks. One such hallmark is the requirement that an estoppel, whether procedural or substantive, must be mutual (see *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77). We are here concerned with estoppel in the procedural realm.

A The appellant was not a party to the Hipparion proceedings. Neither is he, as a director of Hipparion, its representative in interest. He is therefore a stranger to the Hipparion proceedings. The determination of the issues in those proceedings did not in any way affect his rights. The proceedings now taken against him to enforce the guarantee are separate and distinct from the Hipparion proceedings. Accordingly, there is no B mutuality between the parties or interest. Another way of stating the proposition is to say that an estoppel only binds the parties thereto. In the realm of equity, form is irrelevant: it is substance that matters. So it does not matter what form of words are used to state the proposition. The effect is all that matters.

C The view which we take of the law is supported by the following passage from *Spencer Bower and Turner on Res Judicata* (2nd Ed) at p 212:

> But there may be a type of question which when asked of one litigant as regards A is identical with the same question asked of him as regards B. An example is the construction of a document or a statute as it affects [say] D trustees and a beneficiary A, and of the same passage in the same document or statute affecting the same trustees as against beneficiary B, where A and B are mentioned in the document or statute, not by name, but as members of a class between whom no distinction is made. It would seem here that an interpretation of a document or statute contained in a judgment to which A and not B, is a party, will not bind B, who may thereafter, in other E proceedings, contend for a different and more favourable construction as regards himself.

The footnote cites *Re Waring* [1948] Ch 221 as illustrating the proposition stated in the passage above quoted.

Absent mutuality, the appellant's argument cannot stand. Hence, F there is no injustice done to him if the respondent goes behind the four corners of the deed of assignment to show the true purpose for its creation. In this, we are entirely in agreement with En Thomas.

It is trite that a creditor is entitled to pursue all the remedies available to him in law and in equity for the purpose of recovering money due to him G from the debtor and his surety. As observed by Lord Templeman when delivering the advice of the Privy Council in *China & South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842:

> The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. H

We consider the instant appeal as merely illustrative of this principle.

An examination of the learned judge's judgment discloses no error or misdirection on his part. Indeed, we are entirely satisfied that the learned judge sufficiently appreciated the evidence before him and correctly directed I himself upon the applicable law.

Having come to the conclusion that the appeal lacked merit, we dismissed it and made those orders that are usually consequent upon a dismissal.

Appeal dismissed.

Reported by Jafisah Jaafar